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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 675

IRVING D. FRIEDMAN, APPELLANT

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, ET AL.

On Appeal from the United States District Court for the Southern District of New York

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered on December 23, 1958, by a three-judge district court convened under 28 U.S.C. 2284 and 2325, dismissing appellant's complaint seeking to set aside an order of the Interstate Commerce Commission. The Commission's order authorized the merger of the

Alabama and Vicksburg Railway Company (Alabama) and Vicksburg, Shreveport and Pacific Railway Company (Vicksburg) into the Illinois Central Railroad Company. *Illinois Central R. Co. Merger*, 295 I.C.C. 731. Inasmuch as the Jurisdictional Statement does not contain the Commission's report, it is attached hereto as an appendix, *infra*, pp. 8-26.

The Alabama and the Vicksburg companies are operated by the Illinois Central under leases between the corporations expiring July 1, 2282. There is an outstanding option to extend the term of each lease up to a maximum period of 999 years from 2282. *Control of A. & V. Ry. and V., S. & P. Ry.*, 111 I.C.C. 161, 165-166. Both companies are operated as integral parts of the Illinois Central system. Under the leases, the Illinois Central pays the lessors' ("Alabama" and "Vicksburg") corporate expenses not exceeding $5,000 a year, all taxes on the leased properties, interest on lessors' outstanding bonds, and annually an amount equal to 6% of the par value of the capital stock of the Alabama and 5% of the Vicksburg stock. The Illinois Central owns, through a wholly owned subsidiary, 92% of the capital stock of the Alabama, and 93.52% and 92.80% of the common and preferred stock, respectively, of the Vicksburg. These acquisitions of control were approved and authorized by the Commission in 1953. *Alabama & V. Ry. Co. Control*, 290 I.C.C. 36; *Vicksburg, S. & P. Ry. Co. Control*, 290 I.C.C. 808.

On January 16, 1957, agreements were entered into providing for merging the Alabama and the Vicksburg into the Illinois Central, with the latter

being the sole surviving corporation. The Illinois Central would assume all obligations of the Alabama and the Vicksburg, and in turn it would receive all property and interests of the other two. Furthermore, the agreement provides that on the merger date the capital stock of the nonsurviving lines will be converted into common stock of the Illinois Central at prices of $155 per share for Alabama stock, and $126.50 per share for Vicksburg stock, both common and preferred. At their option, the stockholders of the Alabama and the Vicksburg are entitled to receive the authorized price in cash plus dividends due up to the merger date. Other details of the merger agreements are not presently pertinent.

The merger agreements were approved by stockholders of 93.81% of the total outstanding shares of the Alabama stock, 95.30% of the Vicksburg stock, and 85.70% of the Illinois Central stock. Appellant is a dissenting minority stockholder of the Alabama and of the Vicksburg companies.

After appropriate administrative proceedings under Section 5(2) of the Interstate Commerce Act, during which appellant and others appeared and intervened in opposition to the mergers, the Commission on April 14, 1958, issued its report and order authorizing the mergers (App. *infra*, p. 8).

The district court unanimously sustained the Commission's decision.

ARGUMENT

Section 5 of the Interstate Commerce Act (49 U.S.C. 5) empowers the Commission to approve a

voluntary merger of railroads upon finding, first, that the transaction "will be consistent with the public interest," [1] and, secondly, that the terms and conditions of the merger are "just and reasonable." The jurisdiction of the Commission under Section 5 is made plenary and exclusive, and independent of all other State and Federal authority.[2] The rights of stockholders in the merged railroads are governed by *Schwabacher* v. *United States*, 334 U.S. 182, 199, where this Court held:

> In appraising a stockholder's position in a merger as to justice and reasonableness, it is not the promise that a charter made to him but the current worth of that promise that governs, it is not what he once put into a constituent company but what value he is contributing to the merger that is to be made good.

Appellant does not deny that the Commission applied the *Schwabacher* rule in this case. It did so by capitalizing, in terms of the current yield on comparable securities, the dividends payable under the leases to the Alabama and Vicksburg stockholders. As the district court found, "The Commission's capitalization of the present value of future rental payments

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[1] No attack is made here as to the validity of the Commission's determination that the mergers will be consistent with the public interest.

[2] Section 5(11) provides: "The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power * * * to carry such transaction into effect * * *."

is generous, and is amply supported by the evidence" (J. St. 24).

1. Appellant challenges the propriety of *any* present capitalization of future rental payments, on the theory that the leases are legal impediments to the mergers. (J. St. 9). He maintains that by virtue of his being a stockholder of the lessor corporations, he is a creditor of, and has a contractual relationship with, the Illinois Central. The terms of the leases themselves refute this contention.[3] Moreover, such a contention is untenable because it ignores the essential distinction between a corporation and one of its stockholders. The leases were, of course, entered into between the lessor corporations and the lessee, Illinois Central. The district court stated (J. St. 20-21):

> The terms of the lease are very specific in stating that the lessee's promises run only to the lessor. * * * Section 1 of Article Nine makes it perfectly clear that the stockholders of Alabama are neither third-party beneficiaries nor donee beneficiaries of the lessee's promises to the lessor. Section 2 of Article Nine makes equally clear that the lease does not preclude a transfer by merger or sale of the railway and properties of the lessor.

It is manifest that the leases express no intent that the specified rental payments shall survive mergers of the lessors with the lessee, and the very terms of

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[3] The leases appear in the record at pp. 413-534. See also provisions of the lease of the Alabama quoted in footnote 3 of the district court's opinion (J. St. 20-22).

the leases are dispositive of appellant's claim that the leases bar the mergers.

2. Appellant further contends that the Commission erred in not considering the current earning power of the Alabama and the Vicksburg lines, in appraising the value of his stock (J. St. 11). We submit that this point is not subject to judicial review because appellant failed to present it in his petition for reconsideration before the Commission. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36-37; and *United States* v. *Hancock Truck Lines*, 324 U.S. 774, 778 and 779-780.

In any event, the Commission correctly determined that the current or future earning power of the leased properties was irrelevant in view of the duration of the leases. Inchoate interests arising upon expiration of the leases are pertinent only insofar as they affect current value, and it is clear that prospective earning power of stock in 2282 A.D., or later, is no gauge of the current value of the stock. It is necessary to differentiate between present value and prospective value hundreds of years from now. Appellant may have an interest in the separate "earning power" of the Alabama and of the Vicksburg in 2282 A.D. if the leases should not then be renewed, but today his only ascertainable interest is in the rent paid in the form of dividends. As was aptly stated in *Connecticut Ry. & Lighting Co.* v. *Palmer*, 109 F. 2d 568, 570 (C.A. 2), affirmed 311 U.S. 544: "The remainder of the lease covers a span longer than from the battle of Hastings to the present day. To try to forecast events for even a tenth of that futurity would appall the boldest prophet."

We submit that the Commission correctly determined that, under the leases, the rentals represent the earning power of the property as far as the stockholders of the leased lines are concerned, and that the merger terms provide for the stockholders the full equivalent of the rentals payable under the leases.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should be affirmed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission.

FEBRUARY 1959.

APPENDIX

F-9026

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 19677 [1]

ILLINOIS CENTRAL RAILROAD COMPANY MERGER, ALABAMA & VICKSBURG RAILWAY COMPANY, ETC.

Decided April 14, 1958

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* * * *

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS MITCHELL, ARPAIA, AND MCPHERSON

BY DIVISION 4:

Exceptions to the report proposed by the examiner were filed, and the case has been argued orally.

The Illinois Central Railroad Company and The Alabama and Vicksburg Railway Company, common carriers by railroad subject to the provisions of part I of the Interstate Commerce Act, hereinafter referred to as the Illinois Central and the Alabama, respectively, on February 21, 1957, applied for authority (1) under section 5 (2) of the Interstate Commerce Act, as amended, to merge the properties and franchises of the Alabama into the Illinois Cen-

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[1] This report also embraces Finance Docket No. 19678, Illinois Central Railroad Company—Merger—Vicksburg, Shreveport & Pacific Railroad Company, Etc.

tral for ownership, management, and operation, and (2) under section 20a of the act to the Illinois Central (*a*) to issue whatever number of shares of its capital stock that may be required to be delivered in exchange for capital stock of the Alabama, as hereinafter stated, and (*b*), as the successor company, to assume obligation and liability with respect to the securities of the Alabama, Finance Docket No. 19677. On the same date the Illinois Central and the Vicksburg, Shreveport & Pacific Railway Company, also a common carrier subject to part I of the act, hereinafter referred to as the Vicksburg, applied for authority (1) under section 5 (2) to merge the properties and franchises of the Vicksburg into the Illinois Central for ownership, management, and operation, and (2) under section 20a of the act to the Illinois Central (*a*) to issue whatever number of shares of its capital stock that may be required to be delivered in exchange for capital stock of the Vicksburg, as hereinafter explained, and (*b*), as the successor company, to assume obligation and liability with respect to the securities of the Vicksburg, Finance Docket No. 19678. No representations have been made by any State authority. Minority stockholders of the Alabama and the Vicksburg intervened in opposition to the applications, and hearings were held on June 18-19, 1957. Briefs have been filed.

The Illinois Central is an Illinois corporation. It has outstanding 3,103,348 shares of common stock without par value of an aggregate stated value of $155,185,951. The company operates lines of railroad in Illinois, Indiana, and other States. It also operates the properties of the Alabama and the Vicksburg under leases expiring July 1, 2282. See *Alabama & V. Ry Co. and Vicksburg, S. & P. Ry Co. Control*, 111 I. C. C. 161, and Finance Docket No.

15105, *Illinois Central R. Co. Purchase*, 261 I. C. C. 822 (not printed in full), decided December 13, 1945. The rentals under the leases consist of payments of lessors' corporate expenses not exceeding $5,000 a year, all taxes on the leased properties, interest on lessors' outstanding bonds, and annual dividends at the rate of 6 percent on the capital stock of the Alabama and 5 percent on the Vicksburg stock.

The Alabama was incorporated under the laws of Mississippi in 1889. It has outstanding 42,000 shares of capital stock of the par value of $100 a share, of which, at the time of the hearing, 38,724 shares, or 92 percent, were owned by the Mississippi Valley Corporation, hereinafter called the Mississippi Valley, a wholy owned subsidiary of the Illinois Central. The remaining shares were in the hands of the public. Each share is entitled to one vote. Other security holders have no voting rights. Acquisition of control by the Mississippi Valley was approved and authorized in *Alabama & V. Ry. Co. Control*, 290 I. C. C. 36, decided August 4, 1953. The Alabama does not control any corporation. Its line of railroad extends from Meridian to Vicksburg, Miss., 140.71 miles.

The Vicksburg is a Louisiana corporation, incorporated in 1901. Its outstanding capital stock consists of 28,565 shares of common and 21,428 shares of preferred, of the par value of $100 a share for each class of stock. At the time of the hearing, the Mississippi Valley owned 26,713 shares, or 93.52 percent, of the common stock, and 19,886 shares, or 92.80 percent, of the preferred stock. Each share of both classes of stock is entitled to one vote. Acquisition of control by the Mississippi Valley through stock ownership was approved and authorized in Finance Docket No. 18263, *Vicksburg, S. & P. Ry. Co. Control*, 290 I. C. C. 808 (not printed in full), decided October 6,

1953. The Vicksburg does not control any corporation. Its line of railroad extends from Delta Point (or the west bank of the Mississippi River opposite Vicksburg), to Shreveport, La., 169.62 miles, and from Shreveport to Jewella, La., 3.02 miles.

The applicants propose to effectuate the mergers under the terms and conditions of agreements dated January 16, 1957, providing, among other things, that the Alabama and the Vicksburg, hereinafter referred to collectively as the leased lines, will be merged into the Illinois Central, which will be the surviving corporation; that the corporate existence of the leased lines will cease upon the date of merger, except as may be otherwise provided by law; that upon the merger date all property and any other rights and interests whatsoever of the leased lines will be automatically conveyed to and vested in Illinois Central without any act or deed and that the Illinois Central will assume all obligations, liabilities, and duties of the leased lines; that on the merger date the capital stock of the leased lines will be converted into common stock of the Illinois Central at prices of $155 per share for Alabama stock, $126.50 per share for Vicksburg stock, both common and preferred, and at the New York Stock Exchange closing price on the effective date of the merger for Illinois Central stock; that, in lieu of shares of Illinois Central stock, stockholders of leased lines will, at their option, be entitled to receive the authorized price in cash plus a dividend of 6 percent per annum in the case of the Alabama and 5 percent in the case of the Vicksburg for each full month from the last dividend-payment date to the date of the merger; that after the merger date there will be no further issue or transfer of certificates of stock of the leased lines and that, as such certificates are presented to the Illinois

Central, they will be canceled and certicates of Illinois Central stock will be issued in exchange therefor in accordance with the terms and conditions of the merger agreements; that, if a different price for the stocks is approved by us than that specified in the agreements, the merger will not become effective except upon the approval of the directors of the Illinois Central and the leased lines; and that the merger agreements will become effective on the date, heretofore referred to as the merger date, when such agreements are filed and recorded in the office of the secretary of state of Illinois, a counterpart of one or the other agreement, as the case may be, having been theretofore filed in the proper office of the States of Mississippi and Louisiana.

The merger agreements have been approved by stockholders of 93.81 percent of the total outstanding shares of the Alabama stock, 95.30 percent of the Vicksburg stock, and 85.70 percent of the Illinois Central stock.

The agreed prices for the leased lines' stock could not have been arrived at as a result of negotiations among the parties, as the Illinois Central, in effect, acted in the dual capacity of buyer and seller. Nevertheless, the prices are considered fair and adequate to both sides by the officers of the Illinois Central, particularly in view of the fact that such prices represent the maximum prices authorized by us in connection with the acquisition by the Illinois Central of control of the leased lines.

A vice president and director of Halsey, Stuart & Co., Inc., who testified in behalf of applicants and is a specialist in railroad securities, expressed the opinion that the proper interest rate on which to compute the value of the leased lines' stocks, based upon pres-

ent return, is not less than 5 percent. On this basis, the Alabama stock would be worth $120 a share and the Vicksburg stock $100 a share. His opinion was based largely on investment values and yields on comparable securities. The witness referred to similar securities (such as stocks of the Northern Central Railway Company leased to The Pennsylvania Railroad Company, the Mahoning Coal Railroad Company leased to the New York Central Railroad Company, and the Delaware & Bound Brook Railroad Company leased to the Reading Company), rated equally as high or higher, which had an average yield as of June 3, 1957, of 4.97 percent at the offering price, as compared to yields of 3.87 percent on the Alabama stock and 3.95 percent on the Vicksburg stock. In further support of his opinion, he submitted a representative list of recent offerings of municipal and State tax-exempt general obligations and revenue bonds yielding an average return of 3.75 percent in maturities of 20 to 25 years, or equal to a 5-percent taxable return for individuals in the 25-percent bracket and about 10 percent for those in the 50-percent bracket; and also a list of securities of public utilities, including Metropolitan Edison Co., New York Telephone Co., and Boston Edison, all rated class A or higher by Standard & Poor's Railroad Securities, yielding 4.78 to 5.11 percent, as well as other lists of railroad-equipment issues and other rail issues yielding not less than 4 percent. The leased lines' stocks are rated class A in Standard & Poor's, or one rating or more below some equipment-trust certificates of various carriers.

Two other specialists in railroad securities, one employed by the investment banking firm of Kuhn, Loeb & Co., and the other by Harriman, Ripley & Co., Inc., both New York City firms, also testified

with respect to the fairness of the exchange ratio. Based largely on their appraisal of investment values and the yields on comparable securities, as in the case of the previous witness, and considering ratings by Moody's Investors Service and Standard & Poor's, they also concluded that a price which would result in a yield of approximately 5 percent would be a fair basis for evaluation of the stocks of the leased lines. In arriving at their conclusions, these witnesses gave consideration to other factors, such as dependency on the financial strength of Illinois Central for continuity of the dividends, the importance to Illinois Central of the leased lines, the terms of the securities of the leased lines, and of the lease, density of traffic, and location of the properties involved.

A witness for the Illinois Central estimated at the hearing that applicants' proposal would require a maximum issue of 233,348 shares to effect the stock exchange, on the basis of $55 a share for Illinois Central stock. The stock market price, however, has dropped considerably since. On the basis of $30 a share for Illinois Central stock, it would require an issue not in excess of 427,603 shares. Illinois Central will be authorized to issue not in excess of 430,000 shares to provide for market variations. The actual number of shares required to be issued will depend upon the number of shares offered for exchange and the market price of the Illinois Central stock on the date of the merger. The shares that would be received by the Mississippi Valley for its 92- or 93-percent stockholdings are to be canceled upon consummation of the merger. The stock issued to minority stockholders will result in a probable increase in Illinois Central outstanding stock of about 31,000 shares. Stock certificates first will be issued in temporary form, to be exchanged later for definitive certificates.

The securities with respect to which the Illinois Central proposes to assume obligation and liability are first-mortgage 5-percent gold bonds of the Alabama, due May 1, 1974, in the principal amount of $2,500,000, and refunding and improvement mortgage 5-percent gold bonds of the Vicksburg, due November 1, 1973—series B in the principal amount of $1,845,000, and series C in the principal amount of $3,746,000 [2]—or total Vicksburg bonds of $5,591,000. The Illinois Central was authorized to assume obligation and liability as guarantor of all such bonds at the time of the acquisition by the Yazoo & Mississippi Valley Railroad Company of control of the Alabama and the Vicksburg by lease. *Alabama & V. Ry. Co. and Vicksburg, S. & P. Ry. Co. Control, supra.* The expenses of consummating the mergers were estimated at a total of $5,720.

The values of the properties of the Alabama and of the Vicksburg for ratemaking purposes as of June 30, 1918, as reported by division 1, were $7,828,597 and $9,015,000, respectively. *Vicksburg, S. & P. Ry. Co.*, 26 Val. Rep. 481. Additions and betterments, less retirements, from the date of valuation to December 31, 1955, amounted to $2,792,990 and $2,735,731, respectively.

[2] Owned by the Illinois Central.

The balance-sheet statements of the Alabama and the Vicksburg as of December 31, 1956, show, in order, assets of $8,742,967 and $13,000,140. The items included therein are as follows:

	Alabama	Vicksburg
Investment in road and equipment and miscellaneous physical property, less donations and grants and depreciation on equipment	$8,037,438	$11,596,036
Current assets	150,374	142,118
Deferred assets	500,149	1,261,986
Unadjusted debits	55,006	.....
Capital stock	4,200,000	4,999,300
Long-term debt	2,500,000	5,591,000
Current liabilities	42,871	38,860
Unadjusted credits	7,429	505
Surplus	1,992,667	2,370,475

Statements of the income and earned-surplus accounts of the Alabama and the Vicksburg for the year ended December 31, 1956, show, in order: Income from leased road and equipment $378,261 and $343,755, maintenance of investment organization expenses $1,261 and $1,540, fixed charges (principally interest on funded debt) $128,168 and $92,250, net income $248,832 and $249,965, credit balance at beginning of year $1,549,693 and $2,201,611, dividend appropriations $252,000 and $249,965, miscellaneous debits $251 and $0, and credit balance transferred to balance sheet $1,546,274 and $2,209,611.

The balance-sheet statement of the Illinois Central as of December 31, 1956, shows total assets of $705,887,720 and surplus of $270,544,006. Its income statement shows net income after fixed charges of $23,759,206 for 1956. The proposed capitalization of the Illinois Central as of December 31, 1956, would be $359,985,411, consisting of $128,780,000 of Illinois

Central present long-term debt, $5,606,000 of obligations to be assumed under the mergers, $67,608,000 of equipment obligations, $1,844,980 of amounts payable to affiliated companies, and $156,146,431 of capital stock. Its capitalizable assets in road and equipment property alone are $545,222,880. A constructed balance-sheet statement shows that the Illinois Central will increase its total assets by $2,565,469.

The interveners at the time of the hearing represented holders of over 2,400 shares of leased lines' stocks. Of that amount, 470 shares of Alabama stock were acquired subsequent to our approval of the leases of the properties, or during the period June 1951 to October 1956, at prices ranging from $133 to $172 a share, and 80 shares of Vicksburg stock were acquired between December 1952 and June 1956 at prices ranging from $127 to $133 a share. Of the 470 shares of Alabama stock, 110 shares were purchased in 1953, 50 in 1954, 100 in 1955, and 100 in 1956, at prices above $155 a share but only 20 shares cost $170 or more. The record does not disclose the prices paid for the remaining shares in the hands of interveners or other minority stockholders.

The opposition to the application is based principally on the ground that the merger could not be effected as a matter of law, as the leases are uncancellable and applicants cannot require interveners to surrender their stock, or, in the alternative, on the ground that the offer for the leased lines' stocks would constitute inadequate compensation. It is argued that lessors' stocks are of exceptionally high value, as the dividends thereon are guaranteed by the Illinois Central for the next 325 years; that the stockholders are entitled to compensation for tax and other savings that would accrue to the Illinois Central as a result of the mergers; and that the values placed on the stocks for the purposes of the exchange should

reflect the earning power and strategic position of the properties owned by the leased lines.

Interveners' contention that the merger cannot be legally effected presents no issue for our determination. Unquestionably, the proposed mergers are transactions within the scope of subparagraph (a) of section 5 (2) which we have jurisdiction to approve, provided we make, as we herein do, the necessary findings required by that section. Compare *Schwabacher* v. *United States*, 334 U. S. 182, and *Wheeling & L. E. Ry. Co. Lease*, 271 I. C. C. 713, 730. Effectuation of the mergers, after approval by us, is governed by the provisions of subsection (11) of section 5.[3]

One of the counsel for interveners estimated the value of the leased lines' stock at $283.57 a share for the Alabama and $244.48 a share for the Vicksburg. These amounts were computed by adding to book values of $212.97 and $190.88, respectively, amounts ($70.60 and $53.60) produced by capitalizing at 5 percent $3.53 and $2.68, respectively, the last amounts representing the portion allocated to each share of

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[3] That subsection provides: "The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect * * *."

one-half of the anticipated savings from the mergers.[4] However, these calculations do not take into account any liability which would accrue to the Illinois Central for income taxes as result of the savings. Interveners also compared the return on the investment in the leased lines' stocks to an annuity and, on the basis of the $6 and $5 annual dividend payment plus one-half of the merger savings, all capitalized at 3 percent, arrived at a value of $317 a share for the Alabama and $256 a share for the Vicksburg stocks. We are of the opinion that the foregoing calculations do not afford a sound basis for evaluation of the leased lines' stocks. Nor can we agree with the view of interveners' witness that these stocks are superior in quality to long-term United States bonds.

In a consideration of interveners' claim regarding the reasonableness of the proposed terms of the merger, pertinent are the following quotations from the decision of the United States Supreme Court in *Schwabacher v. United States, supra:*

> In appraising a stockholder's position in a merger as to justice and reasonableness, it is not the promise that a charter made to him but the current worth of that promise that governs, it is not what he once put into a constituent company but what value he is contributing to the merger that is to be made good.
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[4] The merger savings per share of stock are determined on the basis of estimated savings in income taxes by the applicant of $297,666 annually in connection with the Alabama and $268,408 in connection with the Vicksburg, divided equally between such companies and the applicant. Thus, the Alabama is given credit for $148,333 and the Vicksburg $134,204.

> In determining whether each class of stockholder receives an equivalent of what it turns in, the Commission, of course, is under a duty to see that minority interests are protected, especially when there is an absence of arm's length bargaining or the terms of the merger have been imposed by management interests adverse to any class of stockholders.

Interveners' counsel offered a motion at the hearing to require applicants to furnish a statement segregating the traffic revenues derived from operation of the leased properties, in order to determine the value of the stocks from the standpoint of earnings contributed to the Illinois Central, citing *Southern Ry. Co. Purchases*, 275 I. C. C. 724, where the lease had expired. The motion was denied by the examiner. We have heretofore held that where a lease in perpetuity is involved, such as is the case here for all practical purposes, earnings of the leased properties are not of controlling importance, and that the rental, in effect, represents the earnings of the property as far as the stockholders of the leased lines are concerned. *Delaware, L. & W. R. Co. Merger*, 257 I. C. C. 91. The fact that the Illinois Central controls the leased lines, contrary to the situation in the case cited, affords no sound basis for a different conclusion in this case. The examiner's ruling is sustained.

As hereinbefore indicated, interveners also contend that in determining a just and reasonable price for the stock, the leased lines should be given credit for one-half of the savings which would accrue to the Illinois Central as a result of the mergers, citing *Florida East Coast Ry. Co. Reorganization*, 282 I. C. C. 81, 159, and *Louisville & N. R. Co. Merger*, 295 I. C. C. 457, 497. The facts in those cases are quite distinguishable from those present here. In the

cited cases, the considered savings were to be made in operating expenses by combining operations theretofore conducted under separate ownership. Thus, in considering the future earnings of the properties, and the relative contribution thereto by each party, it was necessary to make a just allocation of that portion of the earnings which would be brought about by a combination of the properties. As to these earnings, it could not be found that one carrier contributed more than the other, and an equal division of these revenues appeared just. Here, all of the so called savings (with the exception of an insignificant amount resulting from the elimination of expenses of maintaining the leased lines' separate corporate existence and preparing reports and accounting statements) would come about through elimination of the income taxes payable by the Illinois Central or its subsidiary with respect to the amounts paid as dividends on the leased lines' stocks. The actual savings to be effected in any future year are dependent upon the provisions of the Internal Revenue Code then in effect. These savings would result solely from application of the income tax laws and not as a result of any contribution made by the stockholders of the leased lines, and in our opinion they are entitled to no credit therefor.

When the considered properties were leased in 1926, the stockholder ceased to have any interest or concern in the operations or earnings of the properties so long as the leases are in effect, their interest being restricted to the receipt of dividends in the amount of $6 and $5 per share, respectively, during the term of the leases. We are mindful of the possibility that insolvency of the Illinois Central could result in termination of the leases before their maturity; but, even if that company should become subject to reor-

ganization proceedings under section 77 of the Bankruptcy Act, it is unlikely that the leases would be terminated unless it then appeared that the earnings from the subject properties were insufficient to warrant continuance of the rental payments. Thus, the possibility that the stockholders will receive a return in excess of the indicated dividends during the term of the leases is extremely conjectural and remote. The terms of the proposed merger are sufficiently generous to compensate for the surrender of this remote possibility.

For all practical purposes, the stocks of the leased lines have a value to their owners measurable solely by the fixed rental payable under the leases and the dividends payable therefrom on the stock. The evidence adduced by applicants, hereinbefore referred to, adequately supports the reasonableness, indeed the liberality, of the terms offered to the minority stockholders. It is obvious that the prices at which these stocks have been bought and sold during recent years are artificially inflated and in excess of the intrinsic worth of the stocks by reason of the Illinois Central's purchases and the prices approved by us in connection with the authorizations for their acquisition.

As of November 1956, 14 guaranteed railroad stocks, having characteristics similar to those here involved, sold at prices resulting in yields averaging 4.91 percent, and ranging from 4.42 percent with respect to the Wheeling and Lake Erie Railway Company common to 5.26 percent in the case of Mahoning Coal Railroad Company preferred and the Delaware Railroad common.[5] On June 10, 1957, the

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[5] Information contained in Bank & Quotation Record (February 1958) shows that the prices on these stocks have not increased since the hearing but are generally lower.

Illinois Central consolidated mortgage 3¾ percent bonds, series A and B, due 1979, which with other series are secured by a first mortgage on the company's properties, were bid at prices yielding 4.58 percent, and the series H 3⅜ percent bonds, due 1989, at prices yielding 4.50 percent. Recent quotations indicate no substantial increase in those prices since the hearing. It should be pointed out that, as hereinbefore described, each of the respective lines has a substantial amount of mortgage bonds outstanding which, in the event of liquidation or reorganization, would be entitled to priority over the interests of holders of the considered stocks.

Upon consideration of all the evidence, we are of the opinion and find that the fair values of the considered stocks do not exceed amounts which would be produced by capitalizing the respective dividends at a rate between 4.25 and 4.50 percent. Capitalizing the dividends at the lower of these rates would produce $141.18 per share for the Alabama stock and $117.65 per share for the Vicksburg stock. However, to avoid any possibility of injustice to the minority stockholders and to afford the present holders of these stocks the same prices which we have heretofore authorized Illinois Central to pay, and in view of the latter's willingness to pay the larger amounts or to exchange its stock upon the basis of the indicated prices, we are of the opinion that it will be consistent with the public interest to approve the merger upon the terms proposed, and that under these terms the holders of the leased lines' stocks will receive the fair economic equivalent of the rights surrendered by them. It is to be noted that the minority stockholders may elect to receive cash equal to or exceeding the fair value of their stock or to exchange their stock for stock of the Illinois Central without incurring

Federal income tax liability in connection therewith. Thus, they may either withdraw their capital or maintain an interest in the Illinois Central operations, including a diluted interest in the properties of the leased lines.

The proposed mergers will have no adverse effect on existing transportation service to the public, as present operations will be continued by the Illinois Central as owner of the properties instead of as lessee. No other carrier has requested to be included in the transaction. No increase in fixed charges will result, and the transaction does not contemplate any guaranty or assumption of payment or assumption of payment of dividends. The guaranty by the Illinois Central of the payment of the principal and interest on the outstanding securities of the leased lines will not be inconsistent with the public interest. The proposal will enable the Illinois Central to effect its long-contemplated plan of merging the properties of the leased lines with its own, which would result in elimination of expense of maintaining separate corporate entities and in some savings in taxes, and in the preparation of various reports and special accounting statements.

In *Alabama & V. Ry. Co. and Vicksburg, S. & P. Ry. Co. Control, supra*, the Commission approved leases of the properties involved herein by the Yazoo and Mississippi Valley Railroad Company subject to conditions in substance requiring preservation of existing routes and channels of trade previously established by other carriers in connection with the lines involved, for a continuation of the existing neutrality of handling traffic by such lines, and that the lines should be continued as a link for traffic through existing gateways of interchange or such other gateways as might be established under our authority. Subse-

quently, in *Illinois Central R. Co. Purchase, supra,* when the applicant herein was authorized to purchase the properties of the Yazoo & Mississippi Valley and assume the leases of the Alabama and the Vicksburg, respectively, we again imposed the conditions previously prescribed in the lease case. We find in this proceeding that the public interest requires that the same conditions be imposed. Accordingly, our authorization and approval herein are to be understood as being subject to the same conditions as those shown in *Alabama & V. Ry. Co. and Vicksburg, S. & P. Ry. Co. Control, supra.* While it does not appear that railway employees will be adversely affected, our authorization will be made subject to the same conditions for their protection as were prescribed in *Chicago & N. W. Ry. Co. Merger,* 261 I. C. C. 672.

Contentions of the parties either as to law or fact not specifically discussed herein have been given consideration and found without material significance or not justified.

We find (1), subject to the conditions relative to preservation of existing routes and gateways and to protection of railway employees referred to herein, that the proposed merger of the properties of The Alabama and Vicksburg Railway Company and the Vicksburg, Shreveport & Pacific Railway Company into the Illinois Central Railroad Company, described herein, are transactions within the scope of section 5 (2) of the Interstate Commerce Act, as amended, that the terms and conditions proposed are just and reasonable, and that the transactions will be consistent with the public interest, and (2) that (*a*) the proposed issue by the Illinois Central Railroad Company of not exceeding 430,000 shares of its no-par-value common stock to be delivered in exchange for stock of The Alabama and Vicksburg Railway Com-

pany and the Vicksburg, Shreveport & Pacific Railway Company, as aforesaid, and (*b*) the proposed assumption of obligation and liability by the Illinois Central Railroad Company with respect to not exceeding $2,500,000, principal amount, of Alabama & Vicksburg Railway Company first-mortgage 5-percent bonds, due May 1, 1974, and $1,845,000, principal amount, series B, and $3,746,000, principal amount, series C, of Vicksburg, Shreveport & Pacific Railway Company refunding and improvement mortgage 5-percent bonds, due November 1, 1973, all in connection with the proposed mergers, as aforesaid, (*a*) are for lawful objects within the corporate purposes of the Illinois Central Railroad Company, and compatible with the public interest, which are necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (*b*) are reasonably necessary and appropriate for such purposes.

An appropriate order will be entered, in which suitable provisions will be made for the submission of journal entries.

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